

1 **THE ESTLE LAW FIRM**

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9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12 In re

Case No. 11-54401-ASW
Chapter 13

13 KATHARINA HARMON,

OPPOSITION TO DEBTOR'S MOTION FOR
DAMAGES FOR VIOLATION OF AUTOMATIC
STAY

14 Debtor(s).

15 Date: October 4, 2011
16 Time: 1:45 pm
17 Courtroom: 3020

18
19 TO: THE HONORABLE ARTHUR S. WEISSBRODT UNITED STATES BANKRUPTCY
20 COURT JUDGE; TO THE CHAPTER 13 TRUSTEE, AND TO THE DEBTOR:

21 USAA FEDERAL SAVINGS BANK ("USAA") opposes Debtor's Motion for Damages
22 for Violation of Automatic Stay on the following grounds:

23
24 **I.**

25 **STATEMENT OF FACTS**

26 1. On or about November 17, 2007, Douglas L. Harmon ("Harmon") made and
27 delivered to USAA the Agreement in the principal sum of \$50,000.00 plus interest, which sum
28 was to be paid in monthly installments according to a schedule, and continuing until the

1 Agreement is fully paid. The Agreement concerns the following personal property collateral:
2 2008 Honda CRV, VIN: JHLRE487X8C021467 (the "Collateral"). A true and correct copy of
3 the Agreement is attached hereto as Exhibit A and to the Declaration of Carrie Allan to be filed
4 herein.

5 2. As evidenced by the Agreement, Debtor is not a party thereto.

6 3. On or about September 3, 2011, due to Harmon's non-payment and defaults under
7 the Agreement, USAA placed the Collateral to be repossessed.

8 4. On or about September 7, 2011, USAA received notice from Debtor's counsel
9 that the member on the loan, Harmon, had filed for bankruptcy protection. USAA searched
10 PACER records for Harmon's Social Security Number; however, no such bankruptcy petition
11 could be located.

12 5. Subsequently, USAA spoke with Debtor's counsel, who advised it that it was in
13 fact Harmon's wife, unknown to USAA, who had filed for Bankruptcy protection.

14 6. On or about September 9, 2011, USAA returned the Collateral to Harmon.
15

16 II.

17 ARGUMENT

18 A. Debtor Has Failed to Provide Evidence of a Violation of the Automatic Stay.

19 7. Debtor's Motion claims that USAA "willfully violated the automatic stay by
20 repossessing debtor's 2008 Honda CR-V..." However, the Motion fails to provide any evidence
21 that the automatic stay was in fact violated by the repossession. There are no facts alleged to
22 show what interest, if any, the Debtor and the Estate have in the subject loan and Collateral. As
23 stated above, the Collateral was purchased by Harmon alone and the Debtor is *not* a party to the
24 Agreement.

25 8. Debtor fails to provide evidence of or even assert that the Collateral is
26 Community Property (assuming this is her position). A review of Debtor's own schedules, made
27 under oath, fail to identify the Collateral as being Community Property. Schedule B indicates
28 the Collateral is Joint Property, Schedule D indicates the subject loan belongs to Harmon alone,

1 and while Debtor's Schedule H lists Harmon as a Co-Debtor, USAA is not listed as one of his
2 creditors. True and correct copies of the relevant pages of Debtor's Schedules are attached
3 hereto as Exhibit B and to the Declaration of Carrie Allan to be filed herein.

4 9. Based on Debtor's failure to establish that the automatic stay applied to USAA,
5 Debtor cannot claim damages for any such purported violation.

6
7 **B. Even If Debtor Had Established A Violation of the Automatic Stay, the**
8 **Circumstances of This Case Do Not Warrant the Award of Damages Against USAA.**

9 10. Pursuant to 11 U.S.C. §362(k), a debtor who is injured by any "willful violation"
10 of the automatic stay is entitled to recover actual damages. Courts have held that willful
11 violation "does not require a specific intent to violate the automatic stay. Rather, 11 U.S.C.
12 §362(k) provides for damages upon finding that the creditor knew of the automatic stay and that
13 the creditor's actions which violated the automatic stay were intentional. Sternberg v. Johnston,
14 595 F.3d 937, 945 (9th Cir. 2010); See Also In re Pinkstaff, 974 F.2d 113, 115 (9th Cir. 1992).
15 However, where a creditor's actions occur before the creditor has knowledge of the automatic
16 stay, such violations do not warrant an award of damages under 11 U.S.C. §362(k). In re
17 Herbert, 1998 Bankr. LEXIS 617 (9th Cir. BAP 1998).

18 11. As indicated in the supporting declaration of Carrie Allan to be filed herein,
19 USAA has no record of receiving notice of Debtor's Bankruptcy filing until Debtor's counsel
20 first contacted USAA on September 7, 2011. Even if it had received notice previously, USAA
21 would have had no way of identifying Debtor's Bankruptcy as one related to the subject loan or
22 the Collateral. Thus, it was not until Debtor's counsel contacted USAA, following the
23 repossession, that it received actual notice that a pending Bankruptcy may affect the Collateral.
24 Upon discovering this fact, the Collateral was returned within two (2) days time.

25
26 **C. Attorney's Fees and Costs Associated With Filing the Instant Motion are Not**
27 **Recoverable.**

28 12. Debtor's Motion makes a claim for attorney's fees and costs. Debtor claims that

1 counsel for Debtor “responded to telephone messages and e-mails over the weekend and came in
2 to work on a holiday to meet with Debtor and prepare the necessary paperwork to file the instant
3 motion on the holiday itself.”

4 13. Debtor’s Motion was in fact *not* filed on the holiday itself, as Debtor’s Motion
5 claims. The Motion was filed at 4:55 p.m. on September 6, 2011, the first working day
6 following the holiday weekend.

7 14. Further, the Ninth Circuit limits recovery under 11 U.S.C. §362(k) to fees and
8 costs incurred in *enforcing* the automatic stay and *remedying* the purported stay violation. Any
9 fees and costs incurred in an action for damages stemming from a violation of the automatic stay
10 are *not* recoverable. Sternberg v. Johnston 595 F.3d 937, 945 (9th Cir. 2010).

11 15. In the instant case, Debtor’s motion clearly seeks only damages. No mention of
12 remedying the purported stay violation is made. Further, such a claim is unnecessary as
13 evidenced herein, since USAA has already returned the Collateral to Harmon.

14
15 **D. Debtor Has Failed to Allege and Prove Emotional Distress Damages**

16 16. Emotional distress damages are awardable as “actual damages” under 11 U.S.C.
17 §362(k) where the individual (i) suffers significant harm; (ii) clearly establishes significant harm;
18 and (iii) demonstrates a causal connection between the harm suffered and the automatic stay
19 violation. In re Dawson, 390 F.3d 1139, 1149 (9th Cir. 2004). Here, as set forth above, Debtor
20 has failed to prove a willful violation of the automatic stay, which would entitle her to recover
21 actual damages. Further, Debtor has failed to show significant or long term harm as a result of
22 her unsubstantiated claim that the automatic stay was violated.

23
24 **E. Debtor Has Failed to Meet Her Burden of Proof to Substantiate a Claim for**
25 **Punitive Damages.**

26 17. Debtor’s Motion requests punitive damages “in an amount sufficient to deter
27 USAA from continuing a policy in violation of the Code...”

28 18. Debtor has failed to provide any evidence that USAA was stayed at all, much less

1 that it *willfully* violated the automatic stay. Further, Debtor has failed to assert any facts that
2 show USAA's conduct was malicious, wanton or oppressive as is required to recover punitive
3 damages. See In re Ramirez, 183 BR 583, 590 (9th Cir. BAP 1995).

4 19. Further, Debtor has provided no evidence of actual damages. Debtor's
5 Supporting Declaration makes only a vague reference to having "had plans for the Labor Day
6 holiday weekend but cancell[ing] them..." An 11 U.S.C. §362(k) punitive damages award must
7 be proportional or reasonably related to the actual damages. As there are no identifiable actual
8 damages, Debtor is not entitled to punitive damages either.

9
10 **III.**

11 **CONCLUSION**

12 20. Debtor's Motion fails to establish that a stay existed against USAA and the
13 Collateral. As such, the Debtor has no claim for violations of the automatic stay against USAA.
14 Furthermore, the circumstances of the case do not warrant damages, since USAA returned the
15 Collateral immediately upon discovering even the possibility of a violation of the automatic stay.
16 Accordingly, USAA respectfully requests that the Court deny Debtor's Motion for Damages for
17 Violation of Automatic Stay and refrain from awarding damages in this matter.

18
19 THE ESTLE LAW FIRM

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21 Dated: September 29, 2011

22 By: /s/ Mark D. Estle
23 MARK D. ESTLE, Attorney
24 for Secured Creditor
25 USAA FEDERAL SAVINGS BANK
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